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AUTHORITIES CITED

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NOS. 73-556 and 73-795

FLORIDA POWER & LIGHT COMPANY, *Petitioner*

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL., *Respondents*

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR UNION RESPONDENTS

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals in these consolidated cases (FP&L Pet. App. 3-75)[1] is reported at 487 F.2d 1143. The decisions and orders of the Na-

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[1] "FP&L Pet. App." refers to the Appendix to the Petition in *Florida Power and Light Company*, No. 73-556. References to "App." are to the two Volume Appendix to the briefs in this Court.

tional Labor Relations Board (FP&L Pet. App. 77-102; App. 162-194) are reported at 193 NLRB 30 and 192 NLRB 85, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973 (FP&L Pet. App. 1-2). The petition for a writ of certiorari in No. 73-556 was filed on September 27, 1973, and the petition in No. 73-795 was filed on November 16, 1973. The petitions were granted on January 21, 1974 (App. 80, 81). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.,* hereinafter "the Act") are as follows:

Section 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor * * * .

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

Section 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

Section 13.

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * * * *

Section 14.

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members for crossing a picket line and performing rank-and-file work during an economic strike against the employer.

STATEMENT

The Respondent Unions accept the Labor Board's statement of the case, appearing at pp. 4-12 of its brief, and do not restate it here.

SUMMARY OF ARGUMENT

I.

The issue before the Court is whether a union violates Section 8(b)(1)(B) of the Taft-Hartley Act by fining its own members, who are supervisors, solely because they cross the union's lawful picket line during an economic strike against their employer and perform struck work, that is, work performed by rank-and-file employees in the bargaining unit when no strike is in progress. The court below correctly answered that question in the negative, and the Board's position to the contrary is in conflict with the specific language of that section, the pertinent legislative history and

the decision of this Court in *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175.

The language of Section 8(b)(1)(B) is clear enough. It is an unfair labor practice for a union or its agents "to restrain or coerce",

> "(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . ."

There is nothing in this language which deals with supervisors as such or with union discipline of supervisors, or with the right of employers to utilize supervisors as strikebreakers by performing work performed by rank-and-file employees before the strike.

II.

The legislative history of Section 8(b)(1)(B) shows that Congress was aiming at a narrow and specific objective: to end the practice of some unions of attempting to dictate to employers whom they should "select" as their spokesman during collective bargaining and for the adjustment of grievances. See S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 21; remarks of Senator Taft, 93 Cong. Rec. 3837. Further, in describing Section 8(b)(1)(B), Senator Taft there observed that "[t]his unfair labor practice referred to is not perhaps of tremendous importance . . ." (*Ibid.*) There is no way to square that evaluation with the Board's expansive view that Section 8(b)(1)(B) is a catch-all unfair labor practice provision which protects employers against union discipline of its supervisors for all actions taken at the employer's direction.

The Board's interpretation of Section 8(b)(1)(B) is sought to be supported by radiations from Sections 2(3), 2(11) and 14(a) which were adopted at the same time. While these provisions do reflect a congressional policy that "employers be assured of the undivided loyalty of their supervisors" (Board brief, p. 29), the legislative history gives no indication whatsoever that Congress sought to effectuate that policy by creating an unfair labor practice in Section 8(b)(1)(B). On the contrary, all references to that policy are in connection with Sections 2(3), 2(11) and 14(a), which deprive supervisors of the status of "employees" under the Act which they had enjoyed under Board decisions approved in *Packard Motor Co. v. NLRB*, 330 U.S. 485. Thus, Section 2(3) provides that "supervisors" are excluded from the definition of "employee" for all purposes, and Section 2(11) defines "supervisors". Section 14(a) provides that neither federal nor state law would require employers to treat "supervisors" as "employees."

The separation between Section 8(b)(1)(B) from the sections dealing with the "undivided loyalty" question is revealed also by the fact that the class of supervisors as defined in Section 2(11) differs materially from the class of employee representatives covered by Section 8(b)(1)(B). For, while those who "adjust grievances" fall under both, there are many other persons who meet the definition of "supervisors" in Section 2(11), but who are not within the coverage of Section 8(b)(1)(B), whereas those who represent an employer "for the purposes of collective bargaining" within Section 8(b)(1)(B) are not necessarily supervisors.

III.

The narrow scope intended by Section 8(b)(1)(B) was in fact followed by the Board for more than 20 years, a substantial period of administrative interpretation, which the Board's brief casually characterizes as containing merely "the early cases" under that section. (Board brief at pp. 18-19.). See cases cited at notes 15-17, at p. 19, and accompanying text.) Beginning in 1968, however, the Board issued what was to become the progenitor of a new line of cases, expanding the parameters of Section 8(b)(1)(B) and finding a violation of that section where supervisor-members were disciplined by their union for the manner in which they interpeted the collective bargaining agreement, even though the union made no effort to obtain their replacement or to take any other action banned by the specific language of that section. *San Francisco-Oakland Mailers Union No. 18*, 172 NLRB 2173.

The Board asserts in its brief (at p. 18) that its decisions in the instant cases are the result of an "evolution of Board decisions" beginning with that case. The fact that *San Francisco-Oakland Mailers* departed so suddenly from two decades of Board interpretation arouses considerable skepticism concerning the Board's newly discovered view of Section 8(b)(1)(B). *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351-352; *NLRB* v. *Drivers' Local Union No. 639*, 362 U.S. 274, 290-291. But it is not necessary to disappove the *San Francisco-Oakland Mailers* doctrine as such. It suffices to show that, as the court below concluded, the decisions herein are not a "logical extension" of that doctrine. Indeed, the instant cases represent a quantum leap from that doctrine and cannot be brought within the ambit of its rationale.

In all of the cases under the *San Francsco-Oakland Mailers* line, until the Board's companion decisions in *Illinois Bell* and *IBEW Local 2150* (*Wisconsin Electric Power Company*), 192 NLRB 77, the key to the legality of the union discipline was the nature of the activity for which the supervisor-member was punished. In those cases, the discipline was imposed for some action which the supervisor-member took in interpreting or applying the collective bargaining agreement, or otherwise acting in some capacity as a management representative. But that is not what the Unions in these cases did. They imposed discipline not for interpreting the contract or acting as a spokesman for management in dealings vis-a-vis the union, but for crossing a lawful picket line and performing struck work which would normally be performed by rank-and-file employees when there was no strike.

The Board argues, however (brief, pp. 36-39), that when a supervisor performs the work of rank-and-file employees during a strike, he is functioning in a supervisory or representative capacity. But, as the court below stated:

> ". . . saying that rank-and-file labor is part of a management function is tantamount to saying that black is white. Whatever the parameters of *Meat Cutters'* 'management function' test may be, the term 'management function' has no meaning except in contrast to the concept of rank-and-file work. And the Board's reference to management's 'right' to expect supervisors to perform rank-and-file work is nothing but a facade by which the Board hopes to avoid analysis by assuming the answer to the question before it." (FP&L Pet. App. 28.)

IV.

The Board's error in expanding the reach of Section 8(b)(1)(B) beyond anything originally contemplated is compounded by the effect of that expansion as a direct—and forbidden—intrusion into the area of regulation of strike weapons. The effect of the Board's decisions in these cases is to ban one of labor's weapons in the course of a strike, i.e., the maintenance of solidarity through the imposition of discipline on its members who engage in strikebreaking. In so doing, the Board has ignored the command of this Court in *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 497, that it may not sit "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."

The Board has likewise ignored the statutory command of Section 13 that, "Nothing in this act except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, . . ." See *NLRB* v. *Drivers Local Union No. 639,* 362 U.S. 274, 290, where the Court felt obliged to proceed with caution "against finding in the nonspecific, indeed vague words, 'restrain or coerce' [in Section 8(b)(1)] that Congress intended the broad sweep for which the Board contends."

An additional infirmity in the Board's decisions herein arises from the fact that the supervisor-members in these cases were disciplined for the same conduct that this Court found a proper ground for discipline in *NLRB* v. *Allis-Chalmers Manufacturing Company,* 388 U.S. 175, which, in the words of the court below, "[i]n all relevant respects, * * * is indistinguishable from these cases" (FP&L Pet. App. 30).

The Board's decisions in these cases do not even mention *Allis-Chalmers.* This omission is striking for

the further reason that, in its *San Francisco-Oakland Mailers* decision, *supra,* which the Board purported to follow in these cases, the Board distinguished *Allis-Chalmers* on the ground that the union's objective there was to maintain "solidarity in strike action." That, of course, is the situation here also. And it is the preservation of the strike weapon which is at the heart of the *Allis-Chalmers* decision. See particularly 388 U.S. at 181-182.

V.

Although the Board argues that its decisions herein represent a "fair and reasonable accommodation of the interests involved" (Board brief at p. 40), the controlling point is that its "accommodation" is not that intended by Congress. Moreover, the Board emphasizes, in its discussion of the "accommodation" which it has achieved, the "legitimate interests of supervisors" (brief, p. 44), even though acknowledging that Congress deprived them of the protections of the Act (brief, p. 41). Its arguments on behalf of supervisors underscores that the Board's decisions in these cases rest purely on a policy of its own creation rather than that adopted by Congress 27 years ago.

A. It is important to recall that Section 8(b)(1)(B) speaks only in terms of restraint or coercion of "an employer," rather than of "a supervisor". The effect of the Board's decision below is not only to grant a type of Section 7 right to supervisors, which Congress denied them in 1947, but, since it would free them from the normal contractual obligations owed by members to their union, to grant supervisors rights which exceed those of other union members, as held in *Allis-Chalmers.* In any event, under this Court's holdings in ***NLRB* v. *Granite State Joint Board, Textile Workers Union of America,*** 409 U.S 213, and ***Booster Lodge 405, In-***

ternational Association of Machinists v. *NLRB,* 412 U.S. 84, supervisor-members can at any time resign their union membership and thereby end their union's power over them.

B. Under the express terms of the statute and the legislative history, the "undivided loyalty" question is simply not a factor under Section 8(b)(1)(B). But even if it were, through Section 14(a) Congress gave employers the option of refusing to allow supervisors to remain union members and thus the right to command their "undivided loyalty". Although neither of the Employers in these cases has availed itself of that opportunity, the Board's decision herein would allow them to achieve that result while retaining the benefits they have gained in bargaining by agreeing to the continued union membership of their supervisors.

C. The Unions' interest here, as in *Allis-Chalmers,* is the fundamental one of "protect[ing] against erosion its status under that [federal labor] policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particualrly vital when the members engage in strike." (388 U.S. at 181-182.) There is no more indication that Congress intended to abrogate that right with respect to supervisor-members than with respect to employee-members. As one authority has stated:

> "If, as the Court said in Allis-Chalmers, the union has a substantial interest in disciplining strikebreakers, that analysis ought not to be altered simply because they happen to be in supervisory positions. The thrust against the union as an institution and against its strike function is just as direct and effective." (Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers,* 1970 Duke Law Journal, 1067, 1129.)

ARGUMENT

THE DISCIPLINE OF SUPERVISORS BY A UNION OF WHICH THEY ARE MEMBERS, FOR THEIR PERFORMANCE OF RANK AND FILE WORK IN THE COURSE OF A LAWFUL STRIKE, DOES NOT VIOLATE SECTION 8(b)(1)(B) OF THE ACT.

I. INTRODUCTION

The issue before the Court is whether a union violates Section 8(b)(1)(B) of the Act by fining its own members, who are supervisors, solely because they cross the union's lawful picket line during an economic strike against their employer and perform struck work, that is, work performed by rank-and-file employees in the bargaining unit when no strike is in progress. It is respectfully submitted that the court below correctly answered that question in the negative, and that the Board majority's holding to the contrary is in conflict with the specific language of the Act, its legislative history and the decision of this Court in *NLRB* v. *Allis-Chalmers Manufacturing Company,* 388 U.S. 175. As shown below, the resolution of this issue turns essentially on a question of statutory construction, rather than on the merits of a new policy developed by a majority of the Labor Board.

Section 8(b)(1)(B) makes it an unfair labor practice for a union to "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In Section II, *infra,* we show that the legislative history of this section reveals that Congress was aiming at a narrow and specific objective: the ending of the practice of some unions of attempting to dictate to employers whom they should "select" as their spokesman during collective bargaining and the adjustment of grievances. That was the intended scope of Section 8(b)

(1)(B), and that was the effect given to it by the Board for more than twenty years, a substantial period of administrative interpretation which the Board's brief casually characterizes as containing "the early cases" [2] under that section.

Beginning in late 1968, however, the Board issued what was to be the progenitor of a new line of cases, expanding the parameters of Section 8(b)(1)(B) and finding a violation of that section where supervisor-members were disciplined by their union for the manner in which they interpreted the collective bargaining agreement,[3] even though the union made no effort to obtain their replacement or to take any other action banned by the specific language of that section. *San Francisco-Oakland Mailers Union No. 18,* 172 NLRB 2173. The common thread in that line of cases was the Board's finding that the union had violated Section 8(b)(1)(B) because it disciplined a supervisor-member for an action taken in the course of representing his employer in his collective bargaining or grievance adjustment duties, or while acting in some capacity as a management representative vis-a-vis the union or employees.

In the instant case (*Illinois Bell*), and its companion before the Board, *IBEW Local 2150 (Wisconsin Electric Power Company),* 192 NLRB 77, however, the

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[2] Board brief at 18-19. See cases cited at notes 15-17 of Board's brief, at p. 19, and accompanying text.

[3] It is, of course, perfectly lawful—and the Board offers no contention to the contrary—for supervisors to be union members and to be included in the same bargaining unit with employees, with the mutual consent of their employer and their bargaining representative. *Sakrete of Northern California, Inc.* v. *NLRB,* 332 F.2d 902, 908 (9th Cir. 1964), *cert. denied,* 379 U.S. 961.

Board went far further in its expansion of Section 8(b)(1)(B) and departed even from the rationale of the previous decisions under *San Francisco-Oakland Mailers,* which had received judicial approval.[4] In *Illinois Bell* and *Wisconsin Electric,* the supervisor-members were disciplined not for exercising any supervisory function or acting in any manner as a management representative, but solely for performing (as "employees") struck work behind their own union's lawful picket line. Therefore, the discipline in those cases—unlike the earlier cases under *San Francisco-Oakland Mailers*—was precisely that found permissible in *Allis-Chalmers, supra,* where this Court held that the discipline of a union member for crossing a picket line does not constitute "restraint" or "coercion" within the meaning of Section 8(b)(1).

II. THE BOARD'S DECISIONS IN THESE CASES, BASED UPON ITS "UNDIVIDED LOYALTY" DOCTRINE, EXCEED THE NARROW SCOPE OF SECTION 8(b)(1)(B) INTENDED BY CONGRESS.

A. The Language and Legislative History of Section 8(b)(1)(B).

The language of Section 8(b)(1)(B) is clear enough. It is an unfair labor practice for a union or its agents "to restrain or coerce",

> "(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . ."

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[4] See, for example, *Toledo Local Nos. 15-P and 272, Lithographers and Photoengravers International Union (Toledo Blade Co.),* 175 NLRB 1072, *enforced,* 437 F.2d 55 (6th Cir.); *New Mexico District Council of Carpenters (A. S. Horner, Inc.),* 176 NLRB 797 and 177 NLRB 500, *enforced,* 454 F.2d 1116 (10th Cir.); *Sheet Metal Workers Local 49 (General Metal Products Inc.),* 178 NLRB 139 *enforced,* 430 F.2d 1348 (10th Cir.); *Dallas Mailers Union Local 143 (Dow Jones Co.),* 181 NLRB 286, *enforced,* 445 F.2d 738 (D.C. Cir.); *Meat Cutters Union Local 81 (Safeway Stores),* 185 NLRB 884, *enforced,* 458 F.2d 794 (D.C. Cir.).

There is nothing in this language which deals with supervisors as such, or with union discipline of supervisors, or with the right of employers to utilize supervisors as strikebreakers by performing work which was done by rank-and-file employees before the strike. That Congress did not in express terms prohibit the action of the Unions in these cases is strong evidence that the Board erred in declaring it to be an unfair labor practice. Moreover, the legislative history of Section 8(b) (1)(B) confirms that Congress only intended it to have the narrow scope which its language connotes.

As the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., p. 21):[5]

> "... [A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, *this subsection would not permit a union to dictate who shall represent an employer* in the settlement of employee grievances, *or to compel the removal of a personnel director or supervisor* who has been delegated the function of settling grievances." (Emphasis supplied.)

Similarly, the Senate Minority Report, at page 41, stated that,

> "We agree that it should be made an unfair labor practice for a union to interfere with an employer *in the designation of his representatives,* as provided by section 8(b)(1)." (1 Leg. Hist. 503. Emphasis supplied.)

[5] Reported at 1 Legislative History of the Labor Management Relations Act 427 (U.S. Government Printing Office, 1948). Subsequent references to that work will be cited as "Leg. Hist." References herein to "Cong. Rec." are to the daily Congressional Record.

During the Senate debates, Senator Taft described this provision in even more specific terms:

"This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.' This is the only section in the bill which has any relation to Nation-wide bargaining. Under this provision it would be impossible for a union to say to a company, 'we will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes." (93 Cong. Rec. 3837; 2 Leg. Hist. 1012.)

Senator Ellender spoke of precisely the same problem:

"The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill, in subsection 8(b)(1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of its bargaining representative or in the selection of a personnel director or foreman, or other supervisory official. Senators who heard me discuss the issue early in the afternoon will recall that *quite a few unions forced employers to change foremen.* They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the

> union. This amendment seeks to prescribe a remedy in order to prevent such interferences." (93 Cong. Rec. 4143; 2 Leg. Hist. 1077. Emphasis supplied.)

The above references to the legislative history of Section 8(b)(1)(B), which was the subject of little debate and no opposition, make it abundantly clear that Congress was concerned only with protecting an employer's right to choose, free of union coercion, those persons whom he wished to represent him "for the purposes of collective bargaining or the adjustment of grievances." Specifically, Congress sought to ban in Section 8(b)(1)(B) only the right of unions to force employers against their will to be represented for bargaining purposes by national or other employer associations, and to force employers either to accept a representative of the union's choosing or to give up one of their own choice because of the union's objection. And, as we have shown above, neither the language of Section 8(b)(1)(B) nor its legislative history warrants any reading of that section beyond its literal language.

B. The Language and Legislative History of Sections 2(3), 2(11) and 14(a).

The Board's brief (at pp. 27-32) attempts to support its expansive reading of Section 8(b)(1)(B) by commingling it with amendments to Sections 2(3), 2(11), and 14(a), which were adopted at the same time. It was indeed a congressional policy that "employers be assured of the undivided loyalty of their supervisors" (Board brief, p. 29), but Congress effectuated that policy not by creating an unfair labor practice in Section 8(b)(1)(B), but by establishing that supervisors would not have the status of employees. Section

2(3) provides that "supervisors" are excluded from the definition of "employee" for all purposes, and Section 2(11) defines "supervisors". Section 14(a) provides that neither federal nor state law would require employers to treat supervisors as employees.

The legislative history of Sections 2(3) and 14(a) shows that those provisions were a direct response by Congress to this Court's decision in *Packard Motor Car Co.* v. *NLRB,* 330 U.S. 485, where the Court upheld the Board's finding that the statutory definition of "employee" included foremen, and that they were therefore entitled to the protections of the Act.[6] The congressional response to the *Packard* decision was swift and complete. Congress accepted the policy arguments that employers should be free to demand the undivided loyalty of their supervisors and specifically excluded supervisors from the definition of employees in Section 2(3). At the same time, and as part of its treatment of the same issue, Congress also enacted Section 14(a):

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as

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[6] Even though recognizing the policy arguments advanced for excluding foremen from the Act's coverage, the Court made the observation (which has equal significance here) that, "the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms." (*Id.* at 490.) The Court added:

> "However we might appraise the force of these arguments as a policy matter, we are not authorized to base decisions of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions." (*Id.* at 493.)

employees for the purpose of any law, either national or local, relating to collective bargaining."

The net effect of the amended definition of employees in Section 2(3) and the enactment of Section 14(a) was, as the court below correctly concluded, to permit supervisors to continue to organize if they wished but to deprive them of any protection under Section 7 of the Act, and to free employers of any compulsion to bargain with them. Thus, in the words of the House Report:

> "The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: That no one, whether employer or employee need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." (H. Rep. No. 245 on H.R. 3020, p. 17; 1 Leg. Hist. 308. Emphasis in original.)

The Senate Report put it this way:

> "It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file. As one witness put it, 'Two groups of people working on parallel lines eventually find a parallel interest.'
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> * * *
>
> "In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when

it adopted the Case bill. By drawing a more definite line between management and labor we believe the proposed language has fully met some of the technical criticisms to the corresponding section referred to in the President's veto of that bill. It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock case* (49 N.L.R.B. 733). In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. *It merely relieves employers* who are subject to the national act free *from any compulsion* by this National Board or any local agency to accord to the front line of management the anomalous status of employees." (S. Rep. No. 105 on S. 1126, p. 5; 1 Leg. Hist. 411. Emphasis supplied.)

Further:

"It will be noted, however, that this amendment [excluding supervisors from definition of employees] does not mean that employers cannot still bargain with such supervisors and include them, if they see fit, in collective-bargaining contracts. All that the proposal does is to *prevent employers being compelled to* accord supervisors the anomalous status of employees for purposes of the Wagner Act." (*Id.* at p. 19; 1 Leg. Hist. 425. Emphasis supplied.) [7]

Finally, dealing specifically with Section 14, the Senate Report stated as follows:

"Section 14: This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or

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[7] See also 93 Cong. Rec. 3836, 2 Leg. Hist. 1008-1009 (Sen. Taft).

> State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity." (*Id.* at p. 28; 1 Leg. Hist. 434.)

Congress thus preserved the foreman's right to organize. The specific means afforded to employers to command the undivided loyalties of their supervisors was their *option* to decline to bargain with them collectively and to prohibit them from joining unions. As the Senate Report quoted above stated, employers were freed "from any compulsion" to treat foremen as employees. (S. Rep., *supra,* at pp. 5, 19; 1 Leg. Hist. 411, 425.) Senator Ball analyzed the situation in the same manner:

> "Another provision removes bona fide foremen from the definition of employees in the National Labor Relations Act, thereby removing the compulsion on the employer of bargaining with a union of foremen." [8]

On its review of this legislative history, the court below drew the following lesson from the amendment of Section 2(3) and the enactment of Section 14(a):

> "[B]y expressly providing that foremen could unionize, and by indicating that employers who so desired could continue to bargain collectively with supervisors, Congress effectively gave employers an option. Those who wished to do so could continue to hire union members as supervisors and could continue to engage in collective bargaining with supervisors, resolving whatever conflict of loyalties problems arose through the traditional

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[8] Extension of remarks of Senator Ball, Cong. Rec., May 13, 1947, A 2377; 2 Leg. Hist. 1523.

give-and-take of collective bargaining approved in *Jones & Laughlin Steel Corp., supra,* to arrive at contract clauses dealing with the problem. * * * On the other hand, those employers who wanted to settle the conflict of loyalties problem once and for all would be within their rights in refusing to hire union members as supervisors and refusing to engage in collective bargaining with supervisors." (FP & L Pet. App., 40-41.)[9]

This understanding was shared by the Board itself in its brief to this Court earlier this Term in *Beasley v. Food Fair of North Carolina, Inc.,* No. 72-1497, p. 6.

> "These amendments [2(3), 2(11) and 14(a)] were designed to provide a solution to the conflict-of-loyalty problem created by the unionization of supervisors. Supervisors were free to join unions and to bargain through them if the employer was willing; on the other hand, the employer could insist that his supervisors not join unions and discharge them if they did."

The "amendments" added in 1947 to provide the "solution to the conflict of loyalty problem", cited by the Board, are Sections 2(3), 2(11) and 14(a) (see *id.* at pp. 5-6), but not Section 8(b)(1)(B). (See also *id.* at pp. 6-7, quoting from the legislative history of 2(3), 2(11) and 14(a).) And even in its brief in the present case, the Board finds the "undivided loyalty" policy, on which its whole argument is based, exclusively in that portion of the Senate Report which

[9] In the words of one commentator shortly after passage of Taft-Hartley, "the result is that the collective bargaining position of [foremen] is to be determined by the parties themselves, not by law. This restores the situation to the status quo ante the original NLRA." Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations,* 46 Mich. L. Rev. 593, 600 (1948).

explains the provisions of the Senate bill that placed supervisors outside the definition of employee, thereby overruling *Packard Motor Company* and returning to the Board's prior *Maryland Dry Dock* rule. (See Board brief, p. 29, text and note, at n. 27.)

C. The Demarcation Between Section 8(b)(1)(B) and the Sections Dealing with Supervisory Conflict of Loyalty.

As we have shown, Section 8(b)(1)(B) was addressed to a separate and far more limited question than the conflict-of-loyalty problem which was dealt with in Sections 2(3), 2(11) and 14(a). The separation is further evidenced first, by their lack of relationship in their respective development in the legislative process and, second, by the differences in their language.

Sections 2(3) and 14(a) were descendants of provisions in the Case Bill which was passed by the Congress in 1946 and vetoed by President Truman (H.R. 4908, 79th Cong., 2nd Sess., 1946). As enacted in 1947, they were nothing more than an attempt to reenact, with minor differences not pertinent here, the similar provisions of the Case bill.[10] No provision bearing any resemblance whatever to Section 8(b)(1)(B) was contained in the Case bill, however. Rather, that provision first breathed life in S. 1126, as reported by the Senate Committee on Labor and Public Welfare, 1 Leg. Hist. 112.

Second, the distinctness of Section 8(b)(1)(B) from Sections 2(3) and 14(a) is also shown by their disparity in coverage. Section 8(b)(1)(B) refers only to those persons who represent the employer "for the

[10] See S. Rep. No. 105, p. 5, 1 Leg. Hist. 411, quoted at pp. 19-20, *supra*.

purposes of collective bargaining or the adjustment of grievances." The class of supervisors excluded from the definition of employees in Section 2(3) is, however, defined in Section 2(11) as applying to all individuals,

> ". . . having authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, . . ."

There is some overlap between the class of "supervisors" as defined in Section 2(11) and the class of "representatives" encompassed by Section 8(b)(1)(B): Those who have authority to adjust grievances on behalf of employers fit into both categories. But some individuals who are "supervisors" are not "representatives," because, while they have one or more elements of supervisory authority set forth in disjunctive terms in 2(11), they lack the power to adjust grievances. On the other hand the employer's "representatives for purposes of collective bargaining" (e.g., a multi-employer association, or an attorney who negotiates on an employer's behalf) are 8(b)(1)(B) "representatives" but not Section 2(11) "supervisors".

The correct lesson to be drawn from the contrasting scopes of these sections is that of the court below:

> "Since the scope of Section 8(b)(1)(B) is narrower than that of the supervisor exclusion in Section 2(3), the Board's approach achieves the anomalous result of having certain supervisor-members—those coming within the definitions of both Sections 2(3) and 8(b)(1)(B)—immune

from all union discipline where there is a dispute between the union and the employer, while other supervisor members—those coming within the definition of Section 2(3) but falling outside the definition of Section 8(b)(1)(B)—remain subject to union discipline. Such a dichotomy is awkward on its face, and makes no sense if one accepts the Board's assumption that under Section 14(a) a supervisor owes his undivided loyalty to his employer not only when his employer exercises his right to refuse to hire union members as supervisors, but also where the employer permits supervisors to join unions." (Pet. App. 44-45.) [11]

Finally, it is worth recalling Senator Taft's observation, in describing the nature of Section 8(b)(1)(B), that "[t]his unfair labor practice referred to is not perhaps of tremendous importance, . . ." (2 Leg. Hist. 1012.) [12] There is no way to square that evaluation with the far-reaching scope imputed to Section 8(b)(1)(B) by the Board.

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[11] The validity of this point has also been noted by several recent comments: Note, *Union Discipline of Supervisors: Illinois Bell Telephone Co.*, 14 Wm. & Mary L. Rev. 674, 700-701 (1973); Note, *Union Discipline of Supervisors Who Are Union Members for Performing Rank-and-File Struck Work Is Not an Unfair Labor Practice*, 87 Harv. L. Rev. 458, 467, at n 65 (1973).

[12] This Court has frequently regarded Senator Taft's statements in the course of the debates to be authoritative in interpreting the 1947 amendments. See, e.g., *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 395, n. 21; *NLRB* v. *Drivers' Local Union No. 639*, 362 U.S. 274, 287-288; *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260, n. 16; *NLRB* v. *Allis Chalmers*, 388 U.S. 175, 185-190; *Pipefitters* v. *United States*, 407 U.S. 385, 408-409.

D. Summary

In sum, the language of the statute leaves no room for the Board's expansive view that Section 8(b)(1)(B) is a catch-all unfair labor practice provision which protects employers against union discipline of their supervisors for actions taken at the employer's direction. Rather, its specific terms show that it deals only with protecting the employer's choice of his representatives for bargaining and grievance adjustment. This view is confirmed not only by the legislative history of Section 8(b)(1)(B), which shows that that section means precisely what it says, but by that of other sections of the Act in which Congress *did* confront and deal with the problem of supervisors' conflicting loyalty. Thus, the Board's decisions in these cases are totally lacking in support from the explicit language of the Section 8(b)(1)(B) and the appropriate legislative history. Perhaps in tacit recognition of that fact, the Board begins its defense of the decisions herein by asserting that they are justified as the result of an "evolution" of a new line of Board decisions since 1968. We show next that that assertion is similarly lacking in merit.

III. THE DECISIONS HEREIN CANNOT BE JUSTIFIED AS "THE RESULT OF AN EVOLUTIONARY PROCESS" OF BOARD DECISIONS.

As previously noted, the Board's expansive view of Section 8(b)(1)(B) originated in 1968 in the *San Francisco-Oakland Mailers* case, *supra,* 172 NLRB 2173, and it now asserts that its decisions herein are the result of an "evolution of Board decisions" beginning with that case (Board brief, p. 18). We note at the outset that the Board decisions during the first 20 years of its administration of the Taft-Hartley Amend-

ments are fully consonant with the view of the statute which we have set forth above,[13] a factor which alone should arouse skepticism as to the Board's newly discovered approach to Section 8(b)(1)(B), and weighs heavily against its expanded reading of that section. As this Court stated in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351-352:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so *the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.* See *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294." (Emphasis supplied.)

See also *NLRB* v. *Drivers' Local No. 639,* 362 U.S. 274, 290-291, where this Court said, "We think [the Board's earlier cases] gave a sounder construction to §8(b)(1)(A) than the Board's construction in the present case." (*Id.* at 291.) So, too, the Board's earlier cases "gave a sounder construction" to Section 8(b)(1)(B) than do its decisions beginning with *San Francisco-Oakland Mailers,* and particularly in the present cases.

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[13] This is acknowledged at pp. 18-19 of the Board's brief, as is the fact that *San Francisco-Oakland Mailers* moved away from that narrow view "for the first time" (Board brief, p. 20).

Nevertheless, it is not necessary to disapprove the *San Francisco-Oakland Mailers* doctrine as such. It suffices to show that, as the court below concluded, the decisions herein are not a "logical extension" of that doctrine. Indeed, the instant cases represent a quantum leap from that doctrine and cannot be brought within the ambit of its rationale.

A. The San Francisco-Oakland Mailers Doctrine.

The court below, after noting that the "*Oakland Mailers* doctrine unquestionably expanded Section 8(b)(1)(B) to cover situations not envisioned by the section's enactors" (FP&L Pet. App. 18), nevertheless accepted the Board's argument that the basic rationale of that doctrine was consistent with the purposes of Section 8(b)(1)(B). The court then turned to an examination of that doctrine, from which it concluded that:

> "[a] common theme emerges from these cases which at once defines the scope of the *Oakland Mailers* doctrine and relates that doctrine to the core concerns of Section 8(b)(1)(B). In each case, '[t]he relationship between the Union and its members . . . [was] used as a convenient and, it would seem, powerful tool . . . to compel the Employer's foremen to take pro-union positions in interpreting the collective bargaining agreement.' *San Francisco-Oakland Mailers' Union No. 18, supra,* 172 NLRB [2174]." (FP&L Pet. App. 20.)

That represents an accurate analysis of the theory underlying the *San Francisco-Oakland Mailers* doctrine, under which—at least until the Board's companion decisions in *Illinois Bell* and *Wisconsin Electric*—the key to the legality of the union discipline in

issue was *the nature of the activity for which the supervisor-member was disciplined.* Thus, in all of the prior cases under *Oakland,* the discipline was imposed for some action which the supervisor-member took in interpreting or applying the collective bargaining agreement, or otherwise acting in some capacity as a management representative. But that is not what happened here. The discipline imposed in these cases was precisely that found permissible in *NLRB* v. *Allis-Chalmers,* 388 U.S. 175. In other words, the supervisor-members in this case were fined not for interpreting the contract or acting as a spokesman for management in dealings vis-a-vis the union, but *solely for crossing an authorized picket line and performing struck work*—work which normally would be performed by non-supervisory bargaining unit employees when there was no strike. The contrast between the instant cases and the "common theme" underlying the *San Francisco-Oakland Mailers* doctrine readily appears on examination of some of the key cases which enunciated and applied that doctrine.

In the *San Francisco-Oakland Mailers* case itself, the charges against the supervisor-members were based on "disagreements involving contract interpretations or grievance adjustment" between the union and the foremen (172 NLRB at 2173). In other words, the foremen there were disciplined because of their actions in dealing with employees concerning the administration of the contract.

Next, in *Toledo Locals Nos. 15-P and 272, Lithographers and Photoengravers International Union (Toledo Blade Company),* 175 NLRB 1072, the supervisors were disciplined, as acknowledged by the Board's brief here (p. 21) for "alleged contract violations."

As noted by the Trial Examiner there, the complaint had alleged that the respondent unions had unlawfully disciplined the supervisor members "for the manner in which the superintendent and foremen, as supervisors and representatives of the Blade, had interpreted and administered the Blade's existing bargaining contract with Local 15-P." (*Id.* at 1072.) It is thus clear that, while the questions concerning the supervisor-members' contract interpretation arose in the course of a strike, the Board treated that case strictly as one involving union discipline of supervisor members for the latter's role in interpreting and applying the contract.

While it is true (Board brief, pp. 22-23), that the Sixth Circuit's affirmance of the Board's decision referred to the duties of the supervisors which their employer required them to perform during a strike,[14] the controlling point there—which stands in marked distinction to the present cases—is that the duties for which the supervisor-members were fined related to their function as collective bargaining representatives in interpreting and applying the contract.

The same situation obtained in *Sheet Metal Workers International Association, Local Union No. 49 (General Metal Products Inc.)*, 178 NLRB 139, *enforced* 430 F.2d 1348 (10th Cir.). As the court there observed, the respondent local was seeking through the discipline "to enforce its viewpoint as to the meaning of the contract." (430 F.2d at 1350.) Similarly, in *Dallas Mailers Union, Local No. 143*, 181 NLRB 286, *en-*

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[14] *NLRB* v. *Toledo Locals Nos. 15-P and 272*, 437 F.2d 55, 57 (6th Cir.).

forced 445 F.2d 730 (D.C. Cir.), as the court below explained in its decision herein, the foreman was disciplined "for being too strict with one of the employees under his supervision, and the record clearly indicated that the union desired to have the foreman replaced." (FP&L Pet. App. 20.)

The Board's brief (at pp. 23-24) argues for a broader reach to the *San Francisco-Oakland Mailers* doctrine, based on two decisions involving the same parties, *New Mexico District Council of Carpenters (A. S. Horner, Inc.),* 176 NLRB 797 *(Horner I)* and 177 NLRB 500 *(Horner II),* both *enforced* 454 F.2d 1116 (10th Cir.), claiming that the discipline there was for "actions unconnected with either grievance adjustment or contract interpretation." (Board brief at 23.) Those cases do not help the Board, however. In *Horner I,* the supervisor was disciplined for hiring non-union carpenters and for signing a company letter to employees urging them to vote against the Union in an NLRB election. In the first of these activities he was clearly acting as a supervisor in his function of hiring employees; and, in signing the letter to the employees, he was, as Board member Fanning stated in his dissenting opinion in *Illinois Bell,* "performing a normal supervisory function of informing employees of how management preferred to deal with employee grievances and complaints—a system of direct dealing with employees rather than dealing with them through a representative." (App. 169, at n. 8.) As the court below stated, "Obviously, it is a part of a supervisor's collective bargaining duties to urge management's viewpoint on union members. The union thus disciplined a supervisor for the effective performance of his collective bargaining function, bring-

ing the case squarely within the *Oakland Mailers* rationale." (FP&L Pet. App. 20, at n. 18.) And, in *Horner II,* the supervisor-member could have avoided union discipline only if he had quit his job with his employer, with "the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances." (177 NLRB at 502.) Therefore, as the court below said herein, although *Horner II* does not fit neatly within the *San Francisco-Oakland Mailers* doctrine, it "thus falls close to the original rationale of § 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing." (FP&L Pet. App. 21.)

Finally, the Board seeks support (brief, pp. 24-25) from *Meat Cutters Union Local 81 (Safeway Stores),* 185 NLRB 884, *enforced,* 458 F.2d 794 (D.C. Cir.), where a supervisor-member was disciplined for instituting, at company direction, a new meat procurement policy. The underlying dispute was thus over contract interpretation, and the union used its internal disciplinary proceedings to enforce its view of the contract. The analysis of the court below in these cases of its earlier opinion in *Meat Cutters* is instructive:

> "When *Meat Cutters* was appealed to this court we were clearly concerned that the Board's Section 8(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors. Our objections to such a prohibition are explained in greater detail in Part III of this opinion, but suffice it for now to state that such an approach inequitably gives supervisory personnel all the benefits of union membership without having to bear any of the responsibilities. In its brief in *Meat Cutters,* however, the Board sought to meet these fears and dispel them.

'[I]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield,' the Board argued. 'Thus, in each case, including the instant case, where the Board has found a Section 8(b)(1)(B) violation based on union discipline of a management representative, the conduct which prompted disciplinary action consisted of the representative's efforts to discharge his management responsibilities. * * * In fact, the Board has recently dismissed a Section 8(b)(1)(B) complaint on the ground that the infraction of union rules for which the employer representative was disciplined did not involve the exercise of supervisory or managerial authority.' NLRB brief at 15 in Meat Cutters Union Local 81 v. NLRB, *supra.*

"Partially on the basis of these representations we enforced the Board's decision but with the explicit caveat that '[t]he rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, because he has performed duties as a management representative. * * * The N.L.R.B. has made it clear that a union may legally discipline a supervisor-member for acts which are *not* performed by the individual in furtherance of his obligations as the employer's representative.' Meat Cutters Union Local 81 v. NLRB, *supra,* 147 U.S. App. D.C. at 379-380 n. 12, 458 F.2d at 798-799 n. 12 (Emphasis in original.)

"Perhaps it is unfair to suggest that the Board is dissembling in seeking to draw some support for its present position from *Meat Cutters,* but certainly it is clear that the Board is changing its interpretation of the law to suit the case." (FP&L Pet. App. 26-27.)

B. The Present Cases Do Not Fit Within the San Francisco-Oakland Mailers Rationale.

What is revealed by the above discussion is that, up until the Board's decisions in *Illinois Bell* and *Wisconsin Electric,* the *San Francisco-Oakland Mailers* doctrine rested on the rationale that Section 8(b)(1)(B) bars

> ". . . not only direct union pressure upon an employer to replace his chosen collective bargaining or grievance adjustment representative, but also the indirect pressure which results from union discipline of a supervisor with collective bargaining or grievance adjustment responsibilities, who is a union member, for the manner in which he has performed not only those duties, but also his other lawful functions as a management representative (hereafter 'supervisory or management functions')." (Board brief at pp. 17-18. Footnotes omitted.)

It is simply impossible logically to conclude that the instant cases fit within that rationale, a conclusion drawn not only by the court below and dissenting member Fanning, but by the Board's trial examiner in *Illinois Bell.* As the Court of Appeals stated (at FP&L Pet. App. 21-22):

> "The cases before us, however, are critically different from those decided under *Oakland Mailers* and lie outside the rationale of that case and its progeny. In both cases here the union has disciplined supervisors, not for the way they interpreted the collective bargaining agreement, not for being too strict with union members, but simply for crossing a picket line to perform rank-and-file struck work. There is no underlying dispute relating to contract interpretation or grievance settlement in these cases, but rather an economic clash between union and employer totally

unrelated to the manner in which supervisors perform their collective bargaining or grievance settlement functions. As the trial examiner in *Illinois Bell* pointed out, the previous cases are all

> 'readily distinguishable here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section 8(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in 'collective bargaining or the adjustment of grievances,' to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. * * *'

"[App. 186.] And as Member Fanning pointed out in dissent:

> 'Here the supervisors were not fined because they gave directions to the work force, interpreted the collective-bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities, in a manner in disfavor with the Respondent Union. They were fined because they performed production work in the bargaining unit during a strike. Their Employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act. * * *' [App. 170-171.]"

The Board argues, however (brief, pp. 36-39), that when a supervisor performs the work of rank-and-file employees during a strike, he is functioning in a supervisory or representative capacity.

> "But saying that rank-and-file labor is part of a management function is tantamount to saying that black is white. Whatever the parameters of *Meat Cutters'* 'management function' test may be, the term 'management function' has no meaning except in contrast to the concept of rank-and-file work. And the Board's reference to management's 'right' to expect supervisors to perform rank-and-file work is nothing but a facade by which the Board hopes to avoid analysis by assuming the answer to the question before it." (FP&L Pet. App. 28.)

We submit that this rejection by the Court of Appeals of the same argument below is more than adequate to refute the legalistic legerdemain offered by the Board here. Much of that effort is devoted to a protest over the conclusion of the court below that "[t]he dividing line between supervisory and nonsupervisory work in the present context is sharply defined and easily understood." (FP&L Pet. App. 25; Board brief at 38-39). It is all too confusing, says the Board, arguing further that a supervisor disciplined in this context is unlikely to make "subtle distinctions" if the union later attempts to interfere with his performance in his collective bargaining or grievance adjustment role. (Board brief, p. 35.) [15] The Board's claims of

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[15] Similar arguments are advanced by Florida Power and Light (FP&L brief in No. 73-556, at pp. 10-11) and the Graphic Arts Union Employers of America, *amicus curiae* (brief, pp. 14-18).

The Board's argument on this point adds little enough in the way of aid to the Court's analysis of the issue before it. Its use of

"subtle distinctions" and lack of sharp definitions simply have no meaning in the context of these cases. As the court below noted, the present case presents a polar situation, and Judge Leventhal, concurring, stated that the protection given to employers under the *San Francisco-Oakland Mailers* doctrine "cannot be extended to the cases before us, which lie at the opposite end of the spectrum." (FP&L Pet. App. 55.) [16]

The Board also contends that, "During a strike, supervisory and rank-and-file work is even more apt to be commingled." (brief, at 38-39.) The Board there cites (at n. 38) *San Francisco Typographical Union No. 21 (California Newspapers)*, 192 NLRB

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such prejudicial invective as "a supervisor who has once felt the union's lash" (Brief, p. 35) is an effort to achieve success through emotional rather than logical appeals.

[16] Indeed one recent article referred to the performance of struck work as that "[which] is, by definition, nonsupervisory work." Note, *Limitations on the Right of Unions to Discipline Supervisors*, 53 B.U.L. Rev., 1019 at 1036 (1973). Another, criticizing the majority opinion of the original panel decision in the court below stated that, "If the court was suggesting that the performance of rank-and-file work during a strike is part of the responsibility of a collective bargaining representative, it is submitted that the court's expansive definition of a representative's duties far exceeded reasonable bounds." Note, *Union Discipline of Supervisors: Illinois Bell Telephone Co.*, 14 Wm. & Mary L. Rev. 674, 694 (1973). Still another put it this way:

> "Indeed, rank and file work does not even involve the exercise of authority on behalf of the employer which characterizes not only the processes protected by section 8(b)(1)(B) but also all supervisory duties; consequently, supervisors can easily distinguish discipline for performing rank and file struck work from discipline for the manner in which they represent the employer in those processes."

Note, *Union Discipline of Supervisors Who are Union Members for Performing Rank and File Struck Work is not an Unfair Labor Practice*, 87 Harv. L. Rev. 458, 468 (1973).

523, where supervisors were fined for performing both supervisory and rank-and-file work. That case is also cited at page 25 (n. 19) of its brief, where the Board acknowledges that the Ninth Circuit sustained only the Board's finding of a violation based on the fining of a supervisor for exercising a supervisory function, but declined to enforce that portion of its order finding an additional violation based on the performance of rank-and-file work by the supervisors during a strike. *NLRB* v. *San Francisco Typographical Union No. 21,* 486 F.2d 1347, 1349, pending on petitions for certiorari, Nos. 73-1024 and 73-1199. It is clear from that case that, even though the Board may profess some difficulty in distinguishing between supervisory and nonsupervisory functions, the Ninth Circuit had no difficulty in discerning the difference in the precise context in which these cases arise.

These supposed uncertainties, even if they were legally relevant, are also imaginary as far as the supervisor is concerned.[17] He knows what his normal functions are and what additional functions he has been instructed to perform during a strike. Moreover, he knows what constitutes rank-and-file work, for otherwise he could not direct its performance. In any event, as Judge Leventhal said, rank-and-file work "lie[s] at the opposite end of the spectrum" from supervisory functions (FP&L Pet. App. 55).

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[17] The Board does not explain why the onus of any uncertainty should be placed on the union by limiting its power to discipline its members, rather than on the employer who can give the supervisor whatever guidance is needed. A similar effort to create an unfair labor practice out of possible uncertainties as to an employee's rights was rejected in *NLRB* v. *News Syndicate,* 365 U.S. 695, 700. See also *Honolulu Star-Bulletin* v. *NLRB,* 274 F.2d 567, 570 (D.C. Cir.) discussing at greater length the Board's theory in that litigation.

The Board, Florida Power and the *Amicus,* Graphic Arts Union Employers, all argue in substance that *any* action undertaken by a supervisor or other management representative at the employer's direction is immune from union dis cipline under Section 8(b)(1)(B). Those claims are met both by the language of the Act and the legislative history. As previously noted, Section 8(b)(1)(B) speaks only of collective bargaining and grievance adjustment functions. Thus, even under *San Francisco-Oakland Mailers,* only discipline of management representatives for their conduct specifically related to the performance of collective bargaining or grievance adjustament activities should be barred. The Board has not, however, so limited its new doctrine and has equated the coverage of that section to the full scope of supervisory duties as defined in Section 2(11). Even accepting the broader test of general supervisory—instead of collective bargaining or grievance adjustment—duties as the test, the action for which the discipline is imposed must bear some resemblance to the act of supervising employees in the performance of their normal work or the direct advancement of the employer's position by his representative vis-a-vis the employee or the union. It is for these purposes only that Congress intended the employers to have the "undivided loyalty" of foremen. But it was never suggested that they were entitled to their "undivided loyalty" in the performance of rank-and-file work, or to operate as strikebreakers.[18]

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[18] See, in addition to the legislative history set forth in Section II, *supra,* the following: H. Rep. No. 245 on H. R. 3020, pp. 8, 116 (1 Leg. Hist. 299, 307); Extension of remarks of Senator Ball, Cong. Rec., May 13, 1947, A 2377 (2 Leg. Hist. 1523-1524).

Perhaps sensing the weakness in the Board's effort to metamorphosize the purest form of nonsupervisory activity into a supervisory or management function, the Graphic Arts Union Employers, *amicus curiae,* takes a bolder approach in its brief. It proposes a different test under which no discipline may be imposed on any action taken by a supervisor "in the interest of the employer." (Graphic Arts brief, p. 14.) Further, *all* work performed by a supervisor during a strike is in the employer's interest, is therefore managerial and is accordingly immune from union discipline (brief, at 17).

A "management interest" test is faulty, however, in several respects. First, it reaches even further beyond the bounds of Section 8(b)(1)(B) than does the Board's effort here to defend the instant cases as a proper application of that section. Second, it sweeps with too broad a brush; a rank-and-file employee who chooses to return to work during the course of a strike is also acting in the employer's interest. But no one would seriously contend that his discipline could violate Section 8(b)(1)(B). Neither the Board, the *Amicus,* nor Florida Power can escape the necessary conclusion that the test of the legality of discipline under Section 8(b)(1)(B) is the nature of the activity for which the supervisor is fined. As member Fanning, dissenting in *Illinois Bell,* stated:

> "If the restraint is imposed upon the supervisor because of his actions in matters unrelated to his general supervisory functions there is no restraint upon the employer with respect to his selection of representatives to perform such functions though he may of course be restrained from the selection of representatives to perform other functions. . . . [A] union-imposed restraint upon a super-

visor because of matters unconnected with his performance of collective-bargaining functions does not restrain or coerce him in the performance of the latter functions and, that being the case, there is no restraint or coercion of the employer in the statutory sense." (App. 170.)

The Graphic Arts brief also relies on the Board's companion (to *Illinois Bell*) decision in *Wisconsin Electric Power Company* (App. 195, *et seq.*), *enforced sub nom NLRB* v. *Local 2150, IBEW,* 486 F.2d 602 (7th Cir.), where the Board majority argued that to permit the union to discipline supervisor-members for performing struck work would permit it "to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform." (App., 199). But this assumes the point at issue, which is whether the employer *did* have "a right to expect a supervisor to perform" rank-and-file work during a strike. If the employer had such a right, its source must be found in this statute, and not in the Graphic Arts' or the Board's view of what the law should be. And none of the briefs on the Petitioners' side points to anything in the statute which creates such a right by terms, or anything in the legislative history which suggests that Congress intended to create such a right.

Moreover, the Board's reasoning in *Wisconsin Electric,* incorporated by reference in its opinion in *Illinois Bell,* simply does not withstand scrutiny. It rests on the premise that a union may not "interfere with" the performance of duties by a management representative with collective bargaining or grievance adjustment responsibilities. That premise is demonstrably faulty.

What is now Section 8(b)(1)(B) had its genesis in Section 8(b)(1) of S. 1126, as reported. That provision made it an unfair labor practice for a union *"to interfere with,* restrain, or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." (S. 1126, p. 14; 1 Leg. Hist. 112 Emphasis supplied.) However, in H.R. 3020, as it subsequently passed the Senate, the provision had been changed to its form in the Act as finally enacted. Specifically, *the words "interfere with" had been deleted,* and only restraint or coercion were prohibited. (p. 81; 1 Leg. Hist. 239.) The words "interfere with" were deleted on the motion of Senator Ives, without objection. 93 Cong. Rec. 4398, 5106; 2 Leg. Hist. 1138-1139, 1454. (See *NLRB* v. *Drivers Local Union, No. 639,* 362 U.S. 274, 285.)

As noted in the dissent in *Illinois Bell,* the most that can be said of the fines imposed on the supervisors here is that they *may* constitute "interference with" the Employers' control over their collective bargaining or grievance adjustment representatives. (The majority opinion in *Wisconsin Electric,* cited above, refers twice to such fines as "interfering with" the duties assigned by the employer to its supervisors.) As aptly stated by Member Fanning, however, "The words 'interfere with' were eliminated from the section by an amendment offered by Senator Ives because of their far-reaching impact. I cannot agree to the reinsertion of those words by decisional interpretation." (App. 174.)

It is noteworthy that most of the courts of appeals passing on the issue herein have rejected the position of the Board, as have an overwhelming number of law review comments. As noted above, the Ninth Cir-

cuit squarely, indeed almost summarily, rejected the Board's position. *NLRB* v. *San Francisco Typographical Union No. 21,* 486 F.2d 1347. (FP&L Pet. App. 119.) Similarly, in a recent decision the Third Circuit, while not indicating its ultimate position, remanded the decision there "for findings on the type of work performed by the three [supervisors] during the strike—whether supervisory or rank-and-file struck work—and a determination in the light of *International Brotherhood, San Francisco,* and *Wisconsin Electric.*" (*Erie Newspaper Guild, Local 187* v. *NLRB,* —— F.2d ——, 84 LRRM 2896, 2904, remanding 196 NLRB 1121.) While the court there professed no intimation of its ultimate position, it would have enforced the Board's order if it felt that the distinction between supervisory and struck work is without merit.

The Sixth Circuit's decision in *Toledo Blade, supra,* is cited by the Board and Graphic Arts as supporting the Board's position herein. However, as we have demonstrated (p. 30, *supra*), that case—although arising in the course of a strike—was treated by the Board as a contract interpretation case rather than one in which, as here, supervisors were disciplined for the performance of struck work.

The sole appellate support for the Board's position is the Seventh Circuit's affirmance of its *Wisconsin Electric Power* decision, *supra,* 486 F.2d 602 (FP&L Pet. App. 105). The majority opinion of the Seventh Circuit was, as noted there (at n.7) prepared before the release of the *en banc* opinion below and relies heavily on the now-rejected decision of the panel majority. Essentially, it represents an acceptance of the Board's reasoning in *Illinois Bell* and *Wisconsin Electric.*

That reasoning has received an even less hospitable reception from the legal commentators. Virtually all of the articles commenting on either the panel or *en banc* opinions below have accepted the view that the proper application of Section 8(b)(1)(B) turns to some extent on a balance between the employer and union interests involved, and have concluded that, under the proper balance to be struck, Section 8(b)(1)(B) cannot be applied to the discipline involved here.[19]

C. The Net Result.

In short, the "evolution" from *San Francisco-Oakland Mailers,* itself of doubtful legitimacy, does not embrace the instant cases. These cases thus represent, pure and simple, a policy invention on the part of the Board. And, in that undertaking, the Board has forgotten the frequent admonitions of this Court that the job of making policy still belongs to Congress and not to administrative agencies. Even if the Board's new policy were a good one, "Congress' policy has not yet

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[19] See, for example, Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers,* 1970 Duke L. J. 1067; Note, *The Role of Supervisors in Employee Unions,* 40 U. Chi. L. Rev. 185, 197 (1972); Note, *Union Discipline of Supervisors Who Are Union Members for Performing Rank and File Struck Work Is Not an Unfair Labor Practice,* 87 Harv. L. Rev. 458, 466-469 (1973); Note, *Union Discipline of Supervisors: Illinois Bell Telephone Company,* 14 Wm. & Mary L. Rev. 674, 703-704 (1973); Note, *Limitations on the Right of Unions to Discipline Supervisors,* 53 B. U. L. Rev. 1019, 1034-1037 (1973); Note, *National Labor Relations Act—Section 8(b)(1)(B)—Union Discipline of Supervisory Employees for Strikebreaking Activities—IBEW* v. *NLRB,* 14 B. C. Ind. & Comm. L. Rev. 785, 799-800 (1973); Note, *Supervisor-Member Exempt from Union Discipline for Acting in Furtherance of Employer's Interest,* 26 Vand. L. Rev. 837, 849-850.

moved to this point." (*NLRB* v. *Insurance Agents,* 361 U.S. 477, 500.) The Board's "arguments are addressed to the wrong branch of government. It may be 'that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress.'" (*National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612, 644.) In *Local 357, International Brotherhood of Teamsters, etc.,* v. *NLRB,* 365 U.S. 667, the Board sought to defend a shotgun approach to the hiring hall. The Court sharply rejected that attempt:

> "Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet, where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. *NLRB* v. *Drivers, Chauffeurs, Helpers, etc.,* 362 U.S. 274, 284-290. Where, as here, Congress has aimed its sanctions only at specific . . . practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme." (*Id.* at 676.)

Perhaps Mr. Justice Harlan most succinctly stated the matter in *U.S.* v. *Calamaro,* 354 U.S. 351, 357: "Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon."

The Board attempts to avoid a careful scrutiny of its actions here by falling back on an appeal for deference to its "specialized experience" (Board brief, p. 39). However, "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decision properly made by Con-

gress." (*American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 318.) Or, as this Court stated more recently, the deference owed to administrative agencies,

> "must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the [unfair labor] practice in question. Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong'." (*Espinoza* v. *Farah Manufacturing Co.,* 414 U.S. 86, 94-95.)[20]

IV. THE BOARD'S EXPANSIVE READING OF SECTION 8(b)(1)(B) IS AN UNWARRANTED ATTEMPT TO REGULATE UNION STRIKE WEAPONS.

A. General Principles.

We have previously demonstrated that the scope of Section 8(b)(1)(B) as intended by Congress is narrow indeed. The Board's error in these cases in broadening the reach of that section beyond anything dreamed of by its enactors is compounded by the effect of that expansion as a direct—and forbidden—intrusion into the area of regulation of strike weapons. Thus, the effect of the Board's decisions in these cases is to ban outright one of labor's weapons in the course of a strike, i.e., the maintenance of solidarity through the imposition of discipline on its members who engage in strikebreaking. We note at the outset that, in so doing, the Board has plainly ignored the command of this Court in *NLRB* v. *Insurance Agents' International*

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[20] For other instances where this Court has been compelled to strike down Labor Board intrusions into the Congressional domain of policy making, see, e.g., *Local 60, Carpenters* v. *NLRB,* 365 U.S. 651; *NLRB* v. *Local 1212, Radio & Television Broadcast Engineers,* 364 U.S. 573; *NLRB* v. *Drivers Local Union No. 639,* 362 U.S. 274.

Union, 361 U.S. 477, 497, that it may not sit "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." (See also, 361 U.S. at 489-490.) It has also ignored the statutory command of Section 13 and this Court's decision in *Allis-Chalmers, supra.*

Section 13 of the Act provides that:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

That the Unions' ability to strike would be impeded or diminished by the construction afforded by the Board to Section 8(b)(1)(B) in these cases arises from the familiar practice of using supervisors as replacements for striking employees in the telephone, utility and other industries.[21] As this Court observed in the *Curtis Brothers case,*[22] in striking down a similarly expansive reading by the Board of Section 8(b)(1)(A),

> "... The Board's order ... can only be sustained if such power is 'specifically provided for' in § 8(b)(1)(A), as added by the Taft-Hartley Act. To be sure § 13 does not require that the authority for the Board action be spelled out in so many words.

[21] With respect to the 1968 national telephone strike, see, for example, N.Y. Times, April 14, 1968, p. 76, Col. 1, and April 20, 1968, p. 1, Col. 2; Business Week, April 27, 1968, pp. 102-103. A similar use of supervisors was noted during a strike this winter involving the same Unions and the same Employer in the *Florida Power* case presently before this court. (Miami Herald, Nov. 1, 1973, p. B1.)

[22] *NLRB* v. *Drivers Local Union No. 639,* 362 U.S. 274.

Rather, since the Board does not contend that § 8(b)(1)(A) embodies one of the 'limitations or qualifications' on the right to strike, § 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, § 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of § 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley." 362 U.S. at 282.

So it is here. The Court there also repeated Mr. Justice Frankfurter's classic admonition in *Local 1976, United Brotherhood of Carpenters and Joiners* v. *NLRB*, 357 U.S. 93, 99-100, that:

"It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests . . . . The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation, is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern 'brain' machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of

statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate."

The Court in *Curtis Brothers* then concluded that:

> "Certainly due regard for this admonition quite apart from the caveat in § 13 requires caution against finding in the nonspecific, indeed vague words, 'restrain or coerce' that Congress intended the broad sweep for which the Board contends." 362 U.S. at 290.

That lesson is even more pointed here, where the Board's decisions in issue not only accord an overly "broad sweep" to the words "restrain or coerce" in Section 8(b)(1), but to the specific language of subsection (B) as well.

B. The Allis-Chalmers Decision.

An additional infirmity in the Board's decisions in these cases arises from the fact that the supervisor-members herein were disciplined for the same conduct that this Court found a proper ground for discipline in *NLRB* v. *Allis-Chalmers Manufacturing Company,* 388 U.S. 175. In spite of the fact that, in the words of the court below, "[i]n all relevant aspects, *Allis-Chalmers* is indistinguishable from these cases" (FP&L Pet. App. 30), the Board's decisions below do not even mention, let alone attempt to distinguish, this Court's decision in *Allis-Chalmers*. And, in its brief here, the Board skips past a meaningful discussion of that case, noting only that Section 8(b)(1)(A) protects against coercion of employees, while 8(b)(1)(B) bars restraint of em-

ployers, and that different interests are therefore protected (Board brief at 45). The *Allis-Chalmers* precedent, reaffirmed last term in *NLRB* v. *Boeing Co.*, 412 U.S. 67, may not be so easily evaded.[23] Since this Court held that the fine of a member for crossing his union's picket line does not constitute "restraint or coercion" within the "meaning of § 8(b)(1)," how can the same union action nevertheless constitute "restraint or coercion" of an employer under subsection (B) thereof? The Board's one paragraph treatment of *Allis-Chalmers* contains no answer to that question.

The Graphic Arts brief argues in this regard (at p. 16) that discipline of supervisors for actions which are undertaken "in furtherance of management's interest" are unlawful "whenever the dispute can be characterized as a dispute between the employer and the union

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[23] We note at the outset that the Board has finally abandoned the argument it advanced so strenuously below, that *Allis-Chalmers* is inapplicable to 8(b)(1)(B), since that case turned on the proviso which is limited to Section 8(b)(1)(A) and provides that subparagraph (A) "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ."

The Board has apparently been convinced, as the court below concluded (FP&L Pet. App. 30-31), that this Court's holding in *Allis-Chalmers* was based on its conclusion that a union's fine of its members for crossing a picket line does not constitute "restraint or coercion" within the meaning of the body of Section 8(b)(1) itself. 388 U.S. at 179, 184, 191-192, 195. Indeed, the Court explicitly stated (at 192, n. 29) that its conclusion, that union discipline in this context was not the prohibited form of "restraint or coercion" applicable to both subsections, made it "unnecessary to pass on the Board holding that the proviso protected such actions." See also in this regard, Sillard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 G.W. L. Rev. 187-190 (1969); Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L. Rev. 227, 268 (1968).

rather than between the union and its members, . . ." That argument is also part of the underpinning for the Board's decisions in *Illinois Bell* (App. 167) and its companion *Wisconsin Electric* decision (App. 195, 199), where the Board stated as follows:

> "Of course, our decision is not meant to imply that a union is completely precluded from disciplining supervisor-union members. It only means that when the underlying dispute is between the employer and the union rather than between the union and the supervisor, then the union is precluded in [sic] taking disciplinary action by Section 8(b)(1)(B)."

Those statements and the pursuit of that argument here by the *Amicus* simply make no sense when placed in juxtaposition to the Board's own analysis of *Allis-Chalmers* in its bellwether *San Francisco-Oakland Mailers* opinion:

> "The Allis-Chalmers case involved a union's fining of its members for crossing picket lines. The primary relationship there affected was the one between the union and its members, and the union's particular objective—solidarity in strike action—was deemed by the Supreme Court a legitimate area for union concern in the circumstances involved. In contrast, in the present case, the relationship primarily affected is the one between the Union and the Employer, since the underlying question was the interpretation of the collective-bargaining agreement between the parties." (172 NLRB at 2174.)

In other words, in *San Francisco-Oakland Mailers* and the succeeding cases in that line, the union discipline was based on a dispute over contract interpretation—"*in contrast*" to the situation in *Allis-Chalmers*

(and here), where the relationship was essentially between the union and its members. Indeed, the Board in *Oakland Mailers* specifically noted that the union's objective in *Allis-Chalmers*—"solidarity in strike action" was held by this Court to be a legitimate one for union concern. Why, then, is it not a legitimate area for union concern here as well? And what happened here to the "contrast" which the Board was able to see so clearly there? Further, if the dispute in *Allis-Chalmers*—where even the Board acknowledged the Union's legitimate object in preserving solidarity in strike action—was found not to be a dispute "between the union and the employer", how is the dispute in this case—involving the same type of union action and also taken in the strike situation—now transformed into a dispute "between the union and the employer"? [24] As previously noted,

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[24] Similarly, there is no basis for any distinction, for which the Board argued below, to the effect that *Allis-Chalmers* involved only an internal union situation while the situation here is designed to have an external effect on the employer. The internal-external distinction is plainly lacking in merit, since the discipline imposed in *Allis-Chalmers* was intended to have no more and no less of an external effect on the employer than that imposed here. And the external effect is the same in both cases. As the court below stated, "The internal-external distinction thus has nothing to do with who is affected by the union discipline. As the Court recognized in *Scofield,* union discipline normally affects all three participants in the union-management relation, employer, employee, and union." (FP&L Pet. App. 35.) If discipline is imposed strictly within the union, it remains internal; it becomes external only if the union seeks to enforce it through the member's employer:

> ". . . The Court thus essentially accepted [in *Allis-Chalmers*] the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but that

the Board's decision in these cases did not even mention *Allis-Chalmers,* and the Board's brief here offers no answer to these questions.

In sum, there is nothing in Section 8(b)(1)(B) which prohibits the same type of union discipline, for the same offense, and under the same circumstances, merely because the discipline is imposed upon members of the union who happen to be supervisors.

After sidestepping the thrust of *Allis-Chalmers,* the Board argues that the more relevant case is *NLRB* v. *Industrial Union of Marine and Shipbuilding Workers* 391 U.S. 418, where the Court refused to allow unions to enforce rules which are "contrary to the plain policy of the Act." *Scofield* v. *NLRB,* 394 U.S. 423, 429. The policy which would be frustrated here, according to the Board, is that "which Congress has incorporated in the Act, of assuring employers the undivided loyalty of their supervisors." (Board brief, p. 46.) One difficulty with that analysis is that the policy to which the Board refers was, as shown above, incorporated in sections of the Act other than 8(b)(1)(B), was aimed at a different and broader problem than that covered by Section 8(b)(1)(B) and embraces a different category of management agents than those specified in 8(b)(1)(B). Moreover, it is well to recall that in *Marine and Shipbuilding Workers,* the policy upon which the Court found the union's rule impinged was the basic and historic jurisprudential principle of free access to

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the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority . . ." (*Scofield* v. *NLRB,* 394 U.S. 423, 428.)

See further 87 Harv. L. Rev., *supra,* at 464, n. 44; 53 B.U. L. Rev., *supra,* at 1025-1026; 14 B.C. Ind. & Comm. L. Rev., *supra,* at 793-794.

judicial and quasi-judicial bodies for effectuation of statutory rights. As the court below observed in this very different context, "If one thing is clear after *Allis-Chalmers,* it is that there is no 'overriding policy of the labor laws' which prohibits reasonable union fines levied against members who cross a lawful picket line to perform rank-and-file struck work." (FP&L Pet. App. 31.)

Our view that this Court's decision in *Allis-Chalmers* strongly supports our position herein is shared by several legal commentaries, the most notable being the leading article by Stanford Professor William Gould, *Some Limitations Upon Union Discipline under the National Labor Relations Act: The Radiations of Allis-Chalmers,* at 1970 Duke Law Journal 1067. The right of unions to discipline supervisors is discussed in some detail by Professor Gould at pages 1127-1129. His analysis is as follows:

> "What union discipline, then, is proper and lawful because it does not affect the foreman-member in his supervisory capacity and therefore does not coerce and restrain the company as such? In dismissing a section 8(b)(1)(B) charge where the supervisor was fined for not complying with union registration requirements, the Board has affirmed trial examiner language to the effect that a union does not violate Section 8(b)(1)(B) by fining 'any supervisor for whatever reason, including, for late payment of dues or disruption of the union meeting. . . .' The critical question is whether the conduct which the union seeks to restrain through a fine is essential or critical to the supervisory function and therefore within management's nonrestrainable rights under Section 8(b)(1)(B).
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> "But suppose one applies the *Allis-Chalmers* fact situation to Section 8(b)(1)(B). Is it possible

to fine a violation for fining strikebreakers where management employs strikebreaking supervisors who perform production work? . . . *If, as the Court said in Allis-Chalmers, the union has a substantial interest in disciplining strikebreakers, that analysis ought not to be altered simply because they happen to be in supervisory positions. The thrust against the union as an institution and against its strike function is just as direct and effective.*" (*Id.* at pp. 1128-1129. Emphasis supplied.) [25]

V. THE COURT OF APPEALS DECISION REPRESENTS THE ACCOMMODATION OF THE VARIOUS INTERESTS INVOLVED WHICH WAS INTENDED BY CONGRESS.

The Board argues that its decisions here represent a "fair and reasonable accommodation of the interests involved." (Brief at p. 40.) Even if that were true, the proper inquiry in these cases is whether the accommodation, or policy, for which it argues is that intended by Congress. We have shown above that it is not. We now show that the decision of the court below represents the accommodation of the interests affected by the instant cases which Congress had in mind.

It is significant that the Board devotes scant attention to the interests of employer and unions and that most of its discussion is devoted to the "legitimate interests of supervisors" (brief, pp. 44, 42-44). Immediately after the quoted phrase, the Board's brief contains this astonishing statement:

"Although the protections of the Act are not extended to supervisors as such, it is both unfair and unwise as a matter of policy to force the

[25] To the same effect are 14 B. C. Ind. & Comm. L. Rev., *supra*, at 788, 792; 53 B.U. L. Rev., *supra*, at 1025; 26 Vand. L. Rev. at 848 ("The [original *Illinois Bell* panel majority's] dismissal of the reasoning of *Allis-Chalmers* probably is not supportable.").

supervisor, as the court below would, to choose between equally damaging courses of action." (Board brief at 41.)

The Board thus concedes—as it must—that Congress deliberately stripped from supervisors their rights under the Act, but then advances its own policy notions why the discipline in this case is nonetheless "unfair" to supervisors. This argument underscores that the Board's decisions in these cases rest upon a policy of its own creation and that its real quarrel is with the policy adopted by Congress some 27 years ago. But, even though the Board may desire a broader reach for Section 8(b)(1)(B), it "cannot go further and establish a broader more pervasive regulatory scheme" than that which Congress has in fact enacted. (*Local 357, International Brotherhood of Teamsters, etc. v. NLRB,* 365 U.S. at 676). We now discuss, in the proper statutory context, the various interests involved and show that the decision of the court below reflects an accommodation which is both fair and fully in accord with Congress' policy.

A. The emphasis on supervisors' interest in the Board's brief, as well as that underlying its decisions in these cases, is completely misplaced and further demonstrates the weakness of the Board's position. Perhaps the lesson revealed with greatest clarity from the legislative history of Sections 2(3) and 14(a) is that Congress deliberately deprived supervisors as defined in Section 2(11) of the protections of the Act. (See pp. 17-23, *supra.*) Neither Section 8(b)(1)(B) nor any other section was designed by Congress for the protection of supervisors. While Congress' solution to the "divided loyalties" problem may seem to be too Draconian for the Board's tastes now, the intention of

Congress cannot be disputed. In short, supervisors no longer have any interests to be protected under Section 8(b)(1)(B). Moreover, because the precise language of Section 8(b)(1)(B) is ignored or glossed over throughout much of the Board's brief, it is well to recall that it speaks only in terms of restraint or coercion of "an employer," rather than of "a supervisor."

Thus, there is no Section 7 right granted to supervisors. If there is to be a change in that regard, the remedy must be provided by Congress and not by the Board on its own motion. Nevertheless, the effect of the Board majority's decision below is to free these union members, merely because they are supervisors, from the normal obligations and duties owed by a member to his union, and to grant to supervisors a type of Section 7 right which Congress expressly denied them in 1947. Indeed, because it would free them from the normal contractual obligations owed their union, the Board has granted them rights which actually exceed those of other union members, as held in *Allis-Chalmers*.[26]

There is a futher answer to the Board's concern for the "plight" of supervisors. Under this Court's holdings in *NLRB* v. *Granite State Joint Board, Textile Wokers Union of Ameica,* 409 U.S. 213, and *Booster Lodge 405, International Association of Machinists* v. *NLRB,* 412 U.S. 84, the supervisor-members can at any time resign their union membership and thereby their

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[26] It is noteworthy that all IBEW members (including supervisors and those on withdrawal cards) remain under an oath of obligation to abide by the IBEW constitution and to bear allegiance to the IBEW (App. 149, 150).

union's power over them. They are thus presented with a complete avenue of escape.[27] Although it is of course true that a member who resigns from the union thereby forfeits whatever benefits may accrue to him solely as a result of his membership, to argue as the Board does that this imposes a "heavy penalty" (brief, at 41) on the supervisor simply highlights the fact that the Board, as the supervisors' advocate here, simply wants them to have it both ways. And, in addition to the lack of any statutory protection for the supervisors, such an argument does not make out a very strong case for "fairness"[28]

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[27] Of course, in *Florida Power and Light*, the collective bargaining agreement (in force in a right-to-work state; Fla. Const., Dec. of Rights, Sec. 12) contains no union security provision compelling membership by supervisors or any one else. Membership in the Union on the part of the supervisors here in issue was thus voluntary (App. 43).

And, in *Illinois Bell*, where the union security clause states that employees in the bargaining unit must remain union members in good standing, the provision further provides that an employee "shall be deemed to be a member in good standing so long as he pays or tenders to the Union an amount equal to the regularly recurring monthly Union dues for the remainder of the term of this Agreement. . . ." (App. 118.)

[28] The view of the court below with respect to the "ordinary standards of equity and fairness" insofar as they apply to supervisors is markedly different from that of the Board. The court noted that:

> "These supervisors directly benefit from union membership, not just from the fringe benefits available to all union members, but from the contract which the union negotiates with management. . . . Can it fairly be said that Congress intended that supervisor-members can perform rank-and-file struck work, undercutting a strike from which they serve to benefit and remain immune from union discipline while all other members of the bargaining remain bound by the majority decision of the union to go out on strike?" (FP&L Pet. App. 46-47.)

B. As noted, the Board argues that employers should be free to demand the total loyalty of their supervisors during a strike, regardless of the type of work in which they are engaged during that strike. The short answer to this argument is that, even assuming that, contrary to our contention, the "divided loyalty" issue were a consideration at all under Section 8(b)(1)(B), an employer can easily avoid that issue altogether by refusing to allow his supervisors to remain union members. Neither company in these cases has availed itself of that opportunity.[29]

Not only has *Illinois Bell* been content to permit its supervisors the right to remain union members and to be covered for some purposes by the collective bargaining agreement, but it should be recalled that the Company did not command its supervisors to work during the strike. Rather, its supervisors were given the option of whether or not to work (App. 259, 265-266, 272), and some who refused to work were nevertheless promoted after the conclusion of the strike (App. 277-277A, 288). Further, some supervisor-members who chose to return to work and perform their regular duties, but who refused to perform rank-and-file work during the strike, were allowed to remain on the job. They were not disciplined by the Union. (App. 286-287.)

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[29] In *Illinois Bell*, Local 134 has represented foremen and general foremen, as well as employees, since it became bargaining representative of the Company's employees in 1909 (Board brief, at pp. 4-5; App. 202-203). Since that date, foremen and general foremen have remained not only members of the Union, but an integral part of the bargaining unit and beneficiaries of the collective bargaining agreements. Their wages, hours and working conditions were specifically bargained for until 1959; since that time, their wages have been omitted from the agreement. At all times, up until the present, they have been covered by the union security provisions (App. 202-203, 117-118, 120-137, 147).

There are, as all of the opinions below noted, certain benefits to employers in permitting supervisors to remain union members when elevated from rank-and-file employee status; benefits which employers may not want to give up. The value of the retention of benefits accruing to supervisors who remain union members, particularly in the context of the desirability of the upward mobility of labor, was forcefully noted by the concurrng opnion below (FP&L Pet. App. 52-57). That opinion gave due recognition both to the unique status of craftsmen who are promoted to foreman status and to the congressional policy of encouraging the upward mobility of labor by permitting the retention of benefits accrued through years of union membership. As Judge Leventhal observed, foremen, although members of management, possess a character akin to that of non-commissioned sergeants in the military, bearing a special relationship both to upper management and to the employees with whom they share a direct working relationship (FP&L Pet. App. 53).[30] These may well be among the reasons why the Employers here opted for allowing their foremen to remain in the Unions.

In any event, if an employer wants the "undivided loyalty" of his supervisors, it is easy enough for him to accomplish that. But it is hardly "fair and reasonable" for an employer to attempt to achieve that goal while retaining the benefits which he has gained in bargain-

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[30] The action of *Illinois Bell*, in particular, in refusing to direct its foremen and general foremen to work during the strike stands as a clear recognition by that Company of the dual loyalty of those foremen during the time of a strike, based on their unique status.

ing by allowing them to continue their union membership.[31] As Professor Gould properly reasoned:

> "... [S]upervisors who remain union members are most often obtaining additional benefits. Frequently, they have remained members in order to retain possession of withdrawal cards which will make it less expensive for them to re-enter the trade or another plant under union jurisdiction. Under the *Allis-Chalmers* rationale, this would seem to indicate a pledge of allegiance by the supervisor and therefore should be deemed consent by such an individual to render himself liable to financial obligations where the union's interest is direct and where the conduct engaged in is somewhat distant from basic supervisory functions. If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign." (Gould, *supra,* at 1970 Duke L. J. at 1129.)

As noted by the court below, the effect of its decision is not to dictate that employers waive completely their right to the loyalty of their supervisors: "Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by *Oakland Mailers* and *Meat Cutters,* im-

[31] Following the *en banc* argument below, the court asked the parties to submit certain additional evidence (App. 204). The response of IBEW Local 134 (App. 209-210) made reference to an attached (App. 211) "Agreement" between Local 134 and Illinois Bell, dated September 28, 1971, three years after the strike giving rise to the instant case, under which Illinois Bell agreed to drop all efforts to seek the exclusion from the bargaining unit of the foremen classifications included therein, in exchange for which it obtained a substantive jurisdictional concession by the union. That document represents a tangible example of the kind of benefit which an employer may obtain by agreeing to allow its supervisors to remain in the union.

munizes them from union discipline imposed *for the manner in which they have performed their supervisory functions.*" (FP&L Pet. App. 50. Emphasis supplied.) And, as the court there stated, an employer which has agreed through the collective bargaining process to accept the union membership of his foremen may also demand contractual restrictions against union discipline. In the words of the Court of Appeals:

> "[T]he employer may condition his permission for supervisors to remain union members upon the union's agreeing to a bargaining contract clause that immunizes supervisors from union discipline for performing rank and file struck work. As we have already seen, such an agreement by which the employer permits supervisors to join unions upon condition that the union give up part of its control over the supervisors is a mode of dealing with the problem of supervisor conflicts of loyalty that, in contrast to the Board's approach, has a firm basis in history both before and after passage of the 1947 amendments. Not only is it historically sound, but it comports with the Act's pervasive focus on collective bargaining as the means for resolving labor-management conflicts. *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45." (FP&L Pet. App. 50-51.)

In *Florida Power*, a contract provision states that employees "in a supervisory capacity may not be 'jacked up' or disciplined through Union machinery for the acts they may have performed as supervisors . . ." (App. 47.) In *Illinois Bell*, a 1954 Memorandum of Understanding, which was reaffirmed in 1971 (see page 62, n. 31, *supra*), states that certain supervisory classifications would be allowed to continue their union membership, but adds that "any allegiance they owe

to the union shall not affect their judgment in the disposition of their supervisory duties." (App. 113.)

From its contract, Florida Power argues (brief, pp. 14-16) that that provision rebuts our challenge to the Board's finding in that case (Florida Power brief, at 14-16). The response to that contention and to any like contention which may be based on the *Illinois Bell* Memorandum of Understanding, is two-fold: First, neither Company took any action to institute its contractual machinery in support of a position that the Union's action in either case violated either the Memorandum of Understanding in *Illinois Bell* or the quoted contractual provision in *Florida Power*. Second, the reason why neither may have moved in that direction is the conclusion which must be drawn that the quoted provisions do not reach as far as that suggested by the Court of Appeals. Thus, the *Illinois Bell* Memorandum of Understanding refers to the foremen's actions in the performance "of their supervisory duties." In *Florida Power,* the prohibition applies only with respect to "acts they may have performed as supervisors." And, as we have shown throughout this brief, this whole case turns on the fact that the actions for which the supervisors here were disciplined were *not* those taken as supervisors.

C. The union's interest is clear enough, as this Court recognized in *Allis-Chalmers,* 388 U.S. at 181-182:

> "Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer

> is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . .' [citing Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951), note 7] Provisions in union constitutions and by-laws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley Amendments."

And, as Professor Gould has observed:

> "If, as the Court said in *Allis-Chalmers,* the union has a substantial interest in disciplining strikebreakers, that analysis ought not to be altered simply because they happen to be in supervisory positions. The thrust against the union as an institution and against its strike function is just as direct and effective." (Gould, *supra,* at 1129.)

D. As we have shown above, what this case involves—and what the earlier cases under the *San Francisco-Oakland Mailers* line did not—is the legality of disciplining supervisor members who act as strikebreakers and thereby threaten the solidarity and survival of the bargaining unit.[32] There is no issue in this case involving the employer's right to the unfettered loyalty of supervisors when they act in a representative capacity

[32] It will be recalled that, in both of these cases, the only supervisors who were disciplined were those who performed struck work, and they were disciplined only for the performance of such work. (*Illinois Bell:* App. 213-215, 286-287; *Florida Power:* App. 38.)

In Section II of its brief, pages 12-14, Florida Power argues that three supervisors who performed struck work normally (when no strike was in progress) supervised non-bargaining unit employees and that no distinction should be drawn in assessing the legality of the discipline of those three supervisors and others who supervised bargaining unit personnel during non-strike times. We have no quarrel with that position.

in the administration of the collective bargaining agreement, the handling of grievances or even the regular supervision of employees under their direction. Accordingly, in order to remain faithful to the rationale of *Allis-Chalmers,* the decision of the court below should be affirmed. The alternative is to allow the policy stated in *Allis-Chalmers,* of permitting unions to protect themselves from internal subversion at the critical time of a strike, to be undercut through the simple device of having unit work performed by union members who are supervisors. Under the decision below, the legitimate interests of both unions and employers are protected, in a manner which is fully consistent with the language of the Act and congressional intent.

Finally, as we have previously noted, a number of the legal commentaries reviewing either the original panel decision or the *en banc* decision below, have, in addition to criticizing the Board's decision in *Illinois Bell,* utilized as an aid to their analyses various balancing tests. And, they have struck the balance each time in favor of the Union's position here and against that of the Board.[33]

We have shown at the outset of this brief that the Board's position here plainly exceeds the literal language of Section 8(b)(1)(B), and that it is lacking in support from the pertinent legislative history, so that the Board's decisions in these cases represent a blatant usurpation of the role of Congress in establishing policy. We have shown, too, that the Board's decisions

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[33] 87 Harv. L. Rev. 458, 466-469; 53 B.U. L. Rev. 1019, 1034-1035; 14 B. C. Ind. & Comm. L. Rev. 785, 796, 800; 26 Vand. L. Rev. 837, 849-850. See also, 40 U. Chi. L. Rev. 185, 197; 14 Wm. & Mary L. Rev. 674, 703-704.

herein cannot be reconciled with this Court's holding in *Allis-Chalmers* or with Section 13 of the Act. We have now also shown that the result below is in fact the accommodation of the interests affected which comports fully with the intention of Congress. Accordingly, the decision of the Court of Appeals should be affirmed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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